The Supreme Court of the United States

OCTOBER TERM 1926

BLACK AND WHITE TAXICAB AND TRANSFER CO., - - Petitioner,

VS } No._____

BROWN AND YELLOW TAXICAB AND TRANSFER CO., - Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

MAY IT PLEASE THE COURT:—

The decision and judgment thereon sought to be reviewed herein was delivered by the Circuit Court of Appeals, Sixth Circuit, on November 5, 1926, affirming the District Court's judgment and is not yet officially reported in the Federal Reports, but can be found on page 53, printed Transcript.

The judgment of the District Court is on page 28 of the Transcript.

JURISDICTIONAL FACTS

This action involves a controversy between the Brown & Yellow Taxicab and Transfer Company, re-

spondent herein, a Tennessee corporation, against your petitioner, the Black & White Taxicab and Transfer Company, a Kentucky corporation, sued jointly with the Louisville & Nashville Railroad Company, a Kentucky corporation, the federal jurisdiction being based on diverse citizenship and the allegation that the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs which latter allegation as to amount is admitted. (Transcript, page 3, Sections IV and V, Bill of Complaint.)

This case involves not only a question of the right of respondent herein to maintain this action in the Federal Court as being brought by collusion and fraud in violation of Sec. 37 of the Judicial Code, but it, likewise, involves the departure by the lower courts from the State Court's construction of the charter of the Louisville & Nashville Railroad Company and Sec. 214 of the Kentucky Constitution and the settled law and policy of Kentucky for the last thirty-five years.

STATEMENT OF THE CASE

The evidence presented to the District Court on the trial of this case discloses the following undisputed facts (Transcript, pages 31-39, inclusive):

That respondent herein had been for several years a Kentucky corporation, doing business in Bowling Green and vicinity; that knowing it could not, as a Kentucky corporation suing in the state courts, enforce a contract giving it exclusive privileges with the Railroad Company, owing to the settled law as adjudged by the Kentucky Court of Appeals, it dis-

solved its Kentucky corporation, but before doing so by resolutions transferred all its assets to the Tennessee corporation; that thereafter it re-incorporated with the same stockholders and officers and under the same name in Tennessee, and executed the contract with the Louisville & Nashville Railroad Company on December 1, 1925, and the next day brought this action in the United States District Court for the Western District of Kentucky.

The appellee is doing no business in Tennessee, has no office in that state, and No. 904 Russell Street in Nashville, Tennessee, which it alleges in its Bill of Complaint is its principal office and place of business, is shown by the affidavit of Joseph H. Acklen, and admitted by Clark, appellee's president, to be a private residence of a railroad engineer and no business of the Brown & Yellow Taxicab & Transfer Company, or any other business is carried on there. The motive for the suit is admitted. (Transcript, pages 35, 36 and 39.) The Railroad Company, instead of resisting the injunction joined with the plaintiff in its motion for same and seeks to get itself enjoined, showing a collusion between them. These are the facts presented and undisputed. The Railroad Company refused to join in the appeal. (Transcript, page 45.)

This appeal involves only the Black & White Taxicab & Transfer Company, as the Diamond Taxi Company mentioned in Amended Bill of Complaint was not brought before the Court nor does the judgment in any way affect it. (Transcript, page 28.)

ASSIGNMENT OF ERRORS

We respectfully state that the District Court and upon appeal the Circuit Court of Appeals in affirming erred as follows:

I. In refusing to dismiss the action under Section 37, Judicial Code, as collusion and fraud to obtain federal jurisdiction and evade the law of Kentucky as declared by its Supreme Court.

II. In refusing to follow the law of Kentucky as defined and settled by its highest court over a period of the past thirty years.

III. In refusing to hold the contract executed by the Railroad, a Kentucky corporation, as in excess of its charter powers, repugnant to the laws of the State, and *ultra vires* and illegal as construed by the Kentucky Supreme Court in similar cases.

IV. In refusing to hold the contract in controversy violative of Section 214, Kentucky Constitution, and prohibited thereby, and to follow and apply the construction of this constitutional provision as made by the Kentucky Supreme Court in similar cases.

V. In allowing the Railroad Company to appropriate and grant to the respondent herein as exclusive parking space, a part of a public street of the city of Bowling Green to the exclusion of this petitioner and the public.

VI. In not following the state court's decisions and thereby causing a chaotic and conflicting condition of law and fact, both in Bowling Green and the State of Kentucky in the matters in issue herein.

ARGUMENT

We will address our argument to the assigned errors in the order above set out.

I. Dismissal of Action Under Section 37 of the Judicial Code

Now the question is presented whether such facts would merit the application of Section 37 of the Judicial Code, which is the Federal Act of March 5, 1875.

It was formerly the law before the passage of the Act above referred to that the motive prompting incorporation could not be questioned, nor was evidence admissible to deny the good faith of the incorporation. This was declared in an opinion by Chief Justice Taney, and it was to this line of decisions that Justice Shiras referred to in his dissenting opinion in the case of *Lehigh Mining & Manufacturing Company* v. *Kelley*, 160 U. S., 327.

But as this Court in that case held it would make the Act of March 5, 1875, idle and of no avail, if, as was done in that case, a Virginia corporation incorporated in Pennsylvania, transferring its Virginia properties to the Pennsylvania corporation, with the same stockholders, and then instituting suit in Federal Court regarding these properties in order to escape and evade the Virginia law, which was adverse to them if tried in Virginia courts.

This Court in that case said:

> "Was the Circuit Court bound to take cognizance of this action as one that involved a con-

troversy between citizens of different states within the meaning of the Constitution and the acts of Congress regulating the jurisdiction of the courts of the United States? This question can be more satisfactorily answered after we shall have adverted to the principal cases cited in argument. The importance of the question before us, to say nothing of the ingenious and novel mode devised to obtain an adjudication of the present controversy by a court of the United States, justifies a reference to those cases . . .

"The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—*and no other purpose is stated or suggested*—of creating a case for the Federal Court, must be regarded as a mere device to give jurisdiction to a circuit court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants, such a device can not receive our sanction. The court below properly declined to take cognizance of the case.

"This conclusion is a necessary result of the cases arising before the passage of the Act of March 3, 1875 (18 Stat., at L. 470, Chap. 137). The 5th section of that act provides that if, in any suit commenced in a circuit court, it shall appear to the satisfaction of that court, at any time after such suit is brought, that it 'does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties have been

improperly or collusively made or joined, either as plaintiffs or defendants, *for the purpose of creating a case* cognizable . . . ' under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit. . . .

"The organization of the Pennsylvania corporation and the conveyance, to it by the Virginia corporation, for the sole purpose of creating a case cognizable by the circuit court of the United States, is in principle, somewhat like a removal from one state to another with a view *only* of invoking the jurisdiction of the Federal Court.

"If this action were not declared collusive, within the meaning of the Act of 1875, then the provision making it the duty of the circuit court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the circuit courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

The above case is almost identical in fact with the case at bar. The motive was the same, the transfer of properties and identity of corporate agencies the same. This Court laid down the rule that Federal Courts could not be made the vehicle or agent to carry out such a scheme as that, and applied the Act aforesaid which is now Section 37 of the Judicial Code.

This decision does not stand alone, but has been followed since in several decisions under similar facts and circumstances.

> *Miller* v. *Lux, Etc., Canal Co.*, 211 U. S., 293. Also see *Foster's Federal Practice*, Vol. 1, p. 134.

The Circuit Court of Appeals in deciding the issue of fraud in obtaining federal jurisdiction adversely to this petitioner bases its decision upon the fact that the Kentucky corporation had been dissolved and the Tennessee corporation substituted.

Although corporations are artificial persons acquiring an original citizenship where incorporated, the intention of changing citizenship or domicile cannot be as flexible and elastic as in cases of individuals, yet the facts in this case and the case of *Morris* v. *Gilman*, 129 U. S., 315, referred to in the lower Court's opinion, would strike one as almost parallel in fact, intent and legal effect.

In the case at bar the corporation returned immediately to Kentucky, transacting all its business therein, and presumably complied with the statutory requirements of Kentucky necessary before acquiring a situs for the transaction of business in this state.

It is a foreigner only for the admitted purpose of getting an advantage denied to Kentucky citizens, though in every other respect and purpose a resident of Kentucky.

The facts in this case certainly establish a case where a plaintiff was both improperly and collusively made for the sole and only purpose of creating a case cognizable in the Federal Court.

We may in this connection pertinently advance the query as to what would be the legal effect of this injunction, the jurisdiction of which is based on adverse citizenship, if the appellee now claiming a Tennessee incorporation would again dissolve its incorporation in Tennessee and transfer its assets including the contract and exclusive rights acquired herein to a reorganized Kentucky corporation? Would the injunctive right under the contract be still enforcible or would it be abrogated by a change back of citizenship?

This is not merely conjectural, but is reasonably probable, and appellee would naturally and plausibly insist that its assets with contractual rights acquired as a Tennessee corporation could not be impaired or rescinded by a retransfer to its successor and assignee, the Kentucky corporation.

II. This Court Should Follow the Decisions of the Kentucky Court of Appeals

Respondent's attorneys will admit that the decisions of the Kentucky Court of Appeals are directly and squarely adverse to their contention and hold the contract sued on void. While this is admitted, yet in order that this Court may get the exact extent, and application of these decisions, we will quote from the syllabi of these in their chronological order.

In the case of *McConnell* v. *Pedigo & Hayes*, 92 Ky., 465, decided in 1892, the Kentucky Court of Appeals held:

> "RAILROADS GRANTING OF EXCLUSIVE RIGHT TO STAND VEHICLES AT DEPOT.—A railroad company can not grant to one person—a common carrier—to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds with his vehicle for the purpose of receiving freight and passengers."

We will further quote from the decision itself, as follows:

> "The company (railroad) has undertaken for a monied consideration, or services equivalent thereto, to control the carrying of passengers from its depot to the hotels of the city, and if this power is recognized as being within what is termed a reasonable regulation in the conduct of its business, the company can deny to any one carrying for hire the right of access to its depot for passengers and freight, and thereby monopolize the entire business of transporting passengers and freight to their proper destination within the city or town where the depot may happen to be located . . ."

> "It is saying to the passenger you can enter the hack of McConnell on the depot grounds and be carried to any part of the city of Glasgow, but if you want to ride in any other public con-

veyance you must leave our grounds to find one. McConnell may charge fifty cents for carrying, while the others are willing to carry for half price, still as the first charge is reasonable you must submit. Such a contract prevents competition and makes such a discrimination as is unreasonable and detrimental to the public. There is no obligation on the company to take the passenger or his freight from the depot, but still it is insisted that the railway company has the right to name the party that shall carry him, to the exclusion of all others. The passenger, under this contract between the railway company and McConnell, may want to ride in defendants' hack, still the latter is not allowed to enter the grounds, but the passenger must be subjected to the inconvenience of leaving the grounds of the company to obtain the vehicle in which he prefers to ride."

In 1909, in the case of *Palmer Transfer Company* v. *Anderson*, 131 Ky., 217, the court through Judge Clay again held, following its former decision, as follows:

"Carriers — Regulation — Use of Carrier's Premises—A contract by which a railroad gave a transfer company the exclusive use of a part of its station grounds along which there was a gravel walk, and which was most convenient to the trains on which the greater number of passengers arrived and departed, so that such passengers were compelled to walk 150 feet past

> the transfer company's cabs before reaching a place where other cabs could stand, gave the transfer company a practical monopoly of the transfer business, and was void."

In 1918, in the case of *Commonwealth* v. *Louisville Transfer Company*, 181 Ky., 305, the State Court of Appeals, through Chief Justice Settle, again said:

> "If the contracts between appellee and the railroads are of a character that attempt to confer upon the former a monopoly of the business of transporting passengers or freight to or from their stations, such contracts, under the rule announced in *McConnell* v. *Pedigo & Hays*, 92 Ky., 465, and *Palmer Transfer Co.* v. *Anderson*, 131 Ky., 217, would be void because of their discriminatory effect, and, therefore, could not operate to deprive others engaged in like business to that of appellee from transporting passengers or freight to or from their station."

So, as it is shown, there is no one-decision law in Kentucky, but it is the settled law as repeatedly adjudicated from 1892 to the present, over a period of more than thirty years.

We may here remark that the very conditions of comparative charge for same service as mentioned in the McConnell case (*supra*) now exists in Bowling Green, as one of respondent's competitors charges about half that it charges for the identical service rendered.

Now what weight should be given by this Court to these decisions which are the settled law as determined by the Supreme Court of the State?

We believe that under the decisions of this Court this law as decided by the Kentucky Court of Appeals should be followed as controlling on this question. This matter has been presented to this Court in numerous cases, but it would be a tax on this Court's time to call attention to more than a few.

In *Hartford Fire Insurance Co.* v. *Chicago, Etc., Ry. Co.*, 175 U. S., 91, the Supreme Court said:

> "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the state *as expressed in its own Constitution and statutes, or declared by its highest court.*"
>
> (The italics in the above quotation are ours.)

In this case the decisions of the Iowa Supreme Court were followed though contrary to the adjudications of the Federal Court on the same question.

This Court will see that not only in the interpretation of the State Constitution and Statutes is the State Court followed, but also in the law as declared by its highest court, and especially where the state law is so well settled as in the case at bar. We are now discussing this question independent of the constitutional and statutory questions, which we will present later.

The Louisville & Nashville Railroad Company is a Kentucky corporation. The contract sued on herein was executed in and to be performed in Kentucky at Bowling Green. It is a Kentucky contract in all particulars. As this Court said in the case of *Equitable Life Insurance Co.* v. *Brown*, 213 U. S., 29, the construction, meaning and effect of such a contract by the Supreme Court of a state is of *the most persuasive influence*, even if not of binding force in the Federal Court. This case involved the construction, meaning and effect of a policy of insurance executed and to be performed in New York, and that court said:

> "As it is a New York Company, and the contract is a New York contract, executed and to be carried out therein, its meaning and construction, as held by the highest court of the state, will be of most persuasive influence, even if not of binding force, in the absence of any Federal question arising in the case. There is no such question here. (Citing authorities.) This principle has been so frequently decided that further reference to adjudged cases need not be made."

We will call this Court's attention to the additional cases of:

> *Palmer* v. *Ohio*, 248 U. S., 32.
> *Hairston* v. *Danville Railway Co.*, 208 U. S., 598.

In Volume 27, Ruling Case Law, paragraph 58, it is stated that "even in matters of general law the

well settled decisions of the state's highest court are persuasive and will receive attention and respect."

When it comes to a question of persuasion, or if this Court should consider the question of comity, or consider the avoiding of conflict and confusion in the interpretation and enforcement of the law, we believe that our position so far as Kentucky is concerned is the more tenable, more reasonable and more equitable.

Furthermore, if respondent's right in the contract in litigation be considered property, then the decision of the state court in regard to this property, establishing a rule regarding same, is universally followed by the Federal Court and upheld.

L. R. A., 1916A, 1011; 40 L. R. A. (N. S.), 380; 40 L. R. A. (N. S.), 412 to 433.
Guffey v. *Smith*, 237 U. S., 101 (see p. 113).
Hinde v. *Vatter*, 5 Pet., 398; 8 U. S., 168.
Swift v. *Tyson*, 16 Pet., 1.
Kuhn v. *Fairmont Coal Co.*, 215 U. S., 349; 54 Law Ed. 228.

The Donovan Case

Now respondent will cite and rely on but one authority, that of *Donovan* v. *Pennsylvania Co.*, 199 U. S., 278. This case, as this Court will see, is no authority adverse to us on the questions herein discussed. In fact, the question raised in this case was expressly not considered and passed on because not presented in that case. On page 300 in the Donovan case, this Court said:

"If the question had been before the state court, and it had adjudged that a railroad corporation could not grant to one person or company the exclusive right within its station to solicit the custom of passengers (the subject not being covered by any valid statute), then it would have been necessary to consider whether the subject was not one of general law, in respect of which the courts of the United States were entitled to exercise their independent judgment, in light of the settled principles that must always control the determination of the legal rights of parties. *No such question is now presented.*"

(The italics in this quotation are ours.)

There are two particular points expressly reserved in the Donovan case, upon which a different decision would have been no doubt reached.

Both of these exceptions are found in the case at bar. One, the statutory and constitutional inhibitions, above referred to and hereinafter discussed; and the other, the long and well-established decisions of the Supreme Court of Kentucky.

This Court in the Donovan case based its decision upon the absence of any valid statute, and furthermore, as a matter of general law, made no decision as this was not presented.

III. The Contract Is In Excess of Railroad Company's Charter Power and Unenforceable

The Louisville & Nashville Railroad Company is

a Kentucky corporation, incorporated by Act of the Legislature of Kentucky, approved March 4, 1850, and found in Acts of the Legislature of Kentucky, 1849-50, Chapter 325, page 354, *et seq.*

The Court of Appeals of Kentucky in considering *this railroad company's* charter right to execute a similar contract in the *McConnell* v. *Pedigo, Etc., case*, 92 Ky., 465, held, and so stated in two places in this opinion, that the contract was in excess of the railroad's charter rights, concluding its decision as follows:

> "There is no question here affecting the safety or comfort of passengers at this depot, but there arises from this contract, if enforced, an inconvenience to the passenger and the public that the company has no power to create, *either by the provisions of its charter* or for the reason that it is the owner of the property on which the depot stands, and the court below properly dissolved the injunction. The judgment is affirmed."
>
> (The italics in this quotation are ours.)

And further in the opinion on the same subject said (page 468):

> "The railroad company in undertaking to say no one shall approach the depot for that purpose except those it may select is *going outside of its charter* and regulating the business of others over whom they have no control."
>
> (The italics in above are ours.)

Now this construction by the Kentucky Court of Appeals that a contract such as is sought to be enforced herein is in excess of the railroad company's charter and unauthorized, thereby is binding upon the Federal Court. The charter of the Louisville & Nashville Railroad Company is, as above stated, an Act of the Kentucky Legislature and the decision of the Court of Appeals in the McConnell case construes an act of the Kentucky Legislature. Therefore, its decision in the McConnell case is certainly binding upon the Federal Court.

To this effect see the case above cited of *Equitable Life Assurance Society* v. *Brown*, 213 U. S., 25; also *Fifth Avenue Coach Co.* v. *New York*, 221 U. S., 467.

In the former case, this Court said, quoting the syllabus:

> "Decisions of the highest court of the state of New York as to the construction of a charter of the insurance company obtained under a law of the state are binding upon the Federal Courts."

The Circuit Court of Appeals cited in this connection as adverse to respondent's position the Kentucky case of *Louisville Property Co.* v. *Com'th*, 146 Ky., 847.

This action was one of escheat by the Commonwealth of Kentucky of certain hotel property owned by the Louisville & Nashville Railroad Company at Guthrie, Kentucky, and used for the accommodation of its passengers at this junction point. It was con-

tended by the State of Kentucky that this property was not used in connection with the railroad's business as a common carrier, and hence escheated under the Kentucky law to the State. In denying the State's contention its Court of Appeals held that this hotel was used in connection with its carrier business for the convenience of its passengers and employees, and furthermore, that this land would be ultimately needed for additional trackage and legitimate railroad uses.

This did not involve any charter rights of the railroad. On the other hand, it does uphold our contention herein, that the contract herein involved must necessarily have been made by the railroad in connection with its business as a common carrier, and hence falls within the inhibition of Sec. 214, Kentucky Constitution.

Now Section 8 of the Act incorporating the Louisville and Nashville Railroad reads as follows:

> "SEC. 8. *Corporate Powers.*—The said Louisville & Nashville Railroad Company, so formed as aforesaid, shall have succession of members for ninety-nine years, may have a common seal, may sue and be sued, plead and be impleaded, in any court of law or equity; and may make all such regulations, rules and by-laws as are necessary for the government of the corporation, or for effecting the object for which it is created: *Provided*, that such regulations, rules and by-laws shall not be repugnant to the laws and constitutions of the said State or the United States; *Provided*, that notice or service of process upon

> the principal ostensible officer or agent of the company, in the State from whose court that process emananted, shall be deemed and taken to be due and lawful notice or service of process upon the company, so as to bring it before the court."

We respectfully submit that the contract and regulation sought to be enforced herein is expressly violative of this section of the railroad's charter, being admittedly in direct contravention of the state law.

The Louisville & Nashville Railroad Company owes its very existence to a legislative act of the State of Kentucky, yet this recipient of a State's liberal dispensation would now seek to enter into and enforce a contract repugnant to the law and jurisprudence of the very state that created it. It would now arrogate to itself privileges and benefits denied to the other Kentucky citizens and which have heretofore been denied to it in the Kentucky courts.

While not a party to this appeal, it has by its legal machinery aided and abetted in getting itself enjoined and in the District Court openly joined with plaintiff for that purpose, in order to enforce a contract which as a Kentucky citizen in Kentucky courts had been in other cases denied it both as against public policy and contrary to its charter powers.

Even if the contract in controversy be not regarded as *ultra vires*, and in express contravention of its corporate charter, it is admittedly illegal under the laws of the State of Kentucky, and against the public policy of the state as declared in numerous decisions of its highest legal tribunal.

While as a matter of original decision this Court may think that the rule as enunciated by it in the Donovan case is the better law and policy, yet to adhere to this decision in the case at bar when the Kentucky courts have for thirty odd years adopted a different policy to which its citizenship have conformed, and which has become the settled and recognized part of our legal fabric, would bring about untold confusion and conflict.

The decisions of a State's highest Court, are in matters of general law most persuasive, and will, as this Court has often stated, be treated with consideration and respect, and especially is this rule applicable when a departure will give an undue advantage to an alien citizen denied to the State's own citizens.

Uniformity in the law is most desirable, and especially should there be a uniformity in its enforcement.

To allow respondent herein to exercise exclusive privileges which had been denied to Kentucky citizens at Glasgow, Louisville and Paducah, and in some instances with this same railroad, would seem an unjust judicial discrimination.

And further, while your petitioner, the Black & White Taxicab and Transfer Company, is enjoined by the Federal Court, another company not a party to this action and resorting to the State courts for redress against this preferential contract, would be under the Kentucky law permitted to exercise the very privileges denied our client.

In fact, this very condition now exists and the Court of Appeals of Kentucky in a mandamus action to compel the Warren (Ky.) Circuit Court to try the case of another transfer company against the railroad and respondent herein involving the validity of this very contract said:

> "But for the Federal Court case, the Warren Circuit Court, following the authorities above cited, would have no doubt promptly decided the case pending before it in favor of the petitioner. But the Federal Court having first acquired jurisdiction of the essential cause of the controversy, the Warren Circuit Court was presented with the dilemma of whether under the State rule concerning the validity of such contracts, he should enjoin the railroad as the petitioner asked or under the doctrine of the comity of courts he should decline to forbid the railroad to do something which it had been ordered to do by a Federal Court of competent jurisdiction. See *State* v. *Murray*, 79 S. C., 316, 60 S. E., 928; 15 C. J., 1160. As there was a chance that the Federal Court would dismiss the suit pending before it because of the alleged fraud on its jurisdiction, and as a prompt decision in that forum was reasonably expected, the respondent was not unreasonable or arbitrary in awaiting the outcome of that case since its decision if it fell one way would relieve the court of all embarrassment and probably insure the petitioner the relief he sought."

Diamond Taxi Co. v. *Gilliam Judge, 216,* Ky., *521,* decided November 12, 1926.

The mandamus was denied as the Circuit Judge's response was to the effect he would decide the case as soon as the opinion of the U. S. Circuit Court of Appeals was filed, and that he was awaiting the decision as a matter of court comity.

This but illustrates the untold confusion and conflict not only in the State of Kentucky, but also locally in Bowling Green, if the judgment of the lower court be upheld.

We may go further and reasonably inquire that with a precedent of this court to uphold them, what is to prevent respondent from extending its business to Glasgow and other cities of the State, entering into similar contracts with the railroad and thereby excluding from competition the very competitor the state court has upheld? This would result in "confusion worse confounded" as this Court can readily see.

The opinion of the Circuit Court of Appeals in holding that the Kentucky decision of *McConnell* v. *Pedigo* (*supra*) did not in effect decide that the railroad company exceeded its charter right, but rather declared it a matter of general law, relied for its conclusions on the case of *Louisville Property Co.* v. *Com'th*, 146 Ky., 847, which we have heretofore discussed and also the following quotation from the *McConnell* v. *Pedigo* opinion:

> "The plaintiff is not operating under the charter of any transfer company that gives him any peculiar privileges by reason of the public services he undertakes."

We must confess that we cannot see how it makes any difference on the question of the railroad company's charter whether the plaintiff (McConnell) in the Pedigo case, or respondent, Brown & Yellow Taxicab and Transfer Company, in the instant case, is a corporation or individual.

Whether incorporated or not, they are alike common carriers of passengers for hire, nor does the incorporation give them any greater privileges or rights of contract than an individual or partnership conducting a similar business would have.

The Kentucky Court in the excerpt quoted merely stated that the plaintiff or transfer company therein did not claim any exclusive or peculiar charter privileges entitling him to the rights claimed. Neither does the appellee herein by virtue of its incorporation claim any exclusive or peculiar rights of contract.

With the greatest deference to the lower court's decision, we can not see the bearing of this part of the Kentucky decision alluded to, on the question of the railroad's charter power, except that the Court assumed that the plaintiff in the McConnell suit was the railroad, which of course was not the case.

IV. The Contract Was Contrary to Section 214, Kentucky Constitution, and Therefore Unenforceable

Section 214 of the Kentucky Constitution is as follows:

"EXCLUSIVE OR PREFERENTIAL CONTRACT FORBIDDEN.—No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, *or for the conduct of any business as a common carrier.*"

(The italics in above quotation are ours.)

It expressly prohibits a railroad from making any exclusive or preferential contract, or advantage with anyone in the conduct of its business as a common carrier. This is so plain and this inhibition so broad and sweeping that it would seem unnecessary to argue this matter to any length. A contract such as here presented, which plainly and unequivocally grants an exclusive and preferential right and advantage by the railroad company to the respondent, is manifestly contrary to this constitutional provision. It is in the capacity of a common carrier of passengers and their baggage that the railroad grants this exclusive right to respondent itself, a common carrier of passengers and baggage, denying thereby equal or any rights in this regard to petitioner or to other tranfer or taxi companies in Bowling Green, who are likewise common carriers. It is only as a common carrier that the railroad company can contract, for that is the only business it can conduct under the Kentucky Constitution.

Section 210, Kentucky Constitution, reads as follows:

"COMMON CARRIER NOT TO ENGAGE IN ANY OTHER BUSINESS.—No corporation engaged in the business of common carrier shall directly or indirectly, own, manage, operate or engage in any other business than that of a common carrier, or hold, own, lease or acquire, directly or indirectly, mines, factories or timber, except such as shall be necessary to carry on its business; and the general assembly shall enact laws to give effect to the provisions of this section." (See Section 768, Ky. Stat.)

This Court will bear in mind that the *McConnel-Pedigo case*, decided in 1892, by the Kentucky Court of Appeals, arose before this present constitutional provision was adopted and this question was never raised in the later cases following the early decision. Had it been, there would have been no hesitancy by the Kentucky Court in holding the contract contrary to the Constitution.

In a similar case, the Kentucky Court of Appeals construed and applied Section 214 of the Kentucky Constitution. This authority is directly in point and the Kentucky Court of Appeals held a contract of this same railroad company very similar to one at bar violated Section 214 of the Constitution and the contract was, therefore, void and unenforceable. We refer to the case of *Louisville & Nashville Railroad Company* v. *Central Stockyards Company*, 133 Ky., 148; 97 S. W., 778, where the railroad company entered into a contract with the Bourbon Stockyards in which was stipulated and agreed by the railroad:

> "That it will deliver and cause to be delivered to the second party (Bourbon Stockyards) so far as it legally may, all livestock shipped over the roads of the first party and consigned to the City of Louisville."

This contract was in this provision declared preferential and in direct violation of Section 214, Kentucky Constitution, the Kentucky Court of Appeals saying:

> "That this is an exclusive and preferential contract, such as is expressly forbidden by Section 214 of the State Constitution, there can be no doubt, and likewise such as the courts everywhere have denounced as against public policy, because promotive of monopoly and hurtful to the public, as well as the person or persons sustaining special injury therefrom."

The Kentucky Court of Appeals commented in this opinion on the doubt by the railroad of its right to make such a contract in using in its contract the words "so far as it legally may." These identical words, "insofar as it can legally do so" are used in the contract sought to be enforced herein, showing a like doubt of its legality, by the defendant railroad. (Transcript, page 15, Section 5.)

> "That the railroad company shall give and grant unto the tranfer company (subject to the conditions and limitations hereinafter set out) the exclusive right and privilege, insofar as it can legally do so, to solicit the handling or haul-

ing of baggage and passengers on the trains of the railroad company and in and around the railroad company's passenger depot and on the surrounding premises; with privilege to have an agent go into the waiting rooms or upon the platforms of the depot to take orders for transfer of passengers or baggage."

As in the Stockyards case, an exclusive right was given by a common carrier in the delivery of its freight to the stockyards, so in the case at bar an exclusive right is granted by the same common carrier in the delivery of its passengers to the respondent on its premises. The cases are identical except as to the matter transported—in that case livestock, in this case passengers, but both clearly in "the conduct of its business as a common carrier" as prohibited by this Constitutional provision. And the Kentucky Court of Appeals further on in this decision stated the effect of its construction of a State Constitutional provision on the Federal Courts, and its recognition by these Courts as controlling, saying:

"The Supreme Court long ago adopted the rule that it would accept the construction of a state constitutional provision or statute adopted by the highest court of such state, provided they do not conflict with some provision of the Federal Constitution or federal statutes. (Citing cases.) As we understand the decisions of the Supreme Court it will in a case like the one at bar apply the same test applied by the state courts, which is whether or not the constitutional provision or statutory provision, as the

case may be, can be enforced within the particular state without affecting the railroad company with respect to the performance of its duties in other states."

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That the Kentucky Court intended that Section 214 apply to all business, passenger or freight, of a railroad, we will quote the following from same opinion (page 177):

"*While a railroad company must be conceded the power to regulate transportation of passengers and freight on its own road, it cannot exercise it in such a manner as to unduly advantage certain individuals and exclude others, or to foster a particular industry by crippling another. It will not be allowed to so operate its road or conduct its business as to promote monopoly or stifle competition; for the one is necessarily hurtful to the public, and therefore against public policy, while the other is the best protection to the public. A railroad company is, therefore, without power to enter into a preferential or exclusive contract with any of its patrons.* If possessed of such power, railroad companies might, as said by Judge Baxter in the Stockyards case of *Coe* v. *L. & N. R. R. Co.*, *supra*, 'destroy a refractory manufactory, exterminate, or very materially cripple competition, and in large measure, monopolize and control the several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad

> companies, equality of accommodation in the use of railroads is a legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede the railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would to a limited extent make them masters, instead of servants, of the people . . ."
> (Italicized by us.)

Now, the *Donovan case* admits that this character of contract is preferential and exclusive for in this opinion this Court said:

> "It is true that by its arrangement with the railroad company the Parmalee Company was given an opportunity to control to a great extent the business of carrying passengers from the Union Passenger Depot to other railway stations and to hotels and private houses in Chicago."

The United States Circuit Court of Appeals has given Sec. 214, Kentucky Constitution, a very narrow and restricted construction, and has held that the final clause, "or for the conduct of any business as a common carrier" is by the rule of *noscitur a sociis* which it applies, restricted to the "receipt, transfer, delivery, etc., of any freight" as set out in the preceding part.

This construction we respectfully submit is both illogical and unauthorized.

This provision of the Constitution is self-executing, and needs no enabling acts to give it effect as an express negative to any claim of right prohibited.

The constitutional provisions should be interpreted to subserve the purpose for which they were enacted, and to that end the evil to be remedied should be considered.

> *Louisville School Board* v. *King*, 127 Ky., 824; 107 S. W., 247.
> *Board of Penitentiary Com'rs*, v. *Spencer*, 159 Ky., 255; 166 S. W., 1017.

And in construing the language used the Kentucky Court of Appeals holds:

> "The language employed in the Constitution is to receive its plain meaning as ordinarily understood by the generality of the people."
>
> *Crick* v. *Rash*, 194 Ky., 205; 229 S. W., 63.
> *Belleter & Wiley* v. *State Highway Com'rs*, 203 Ky., 15; 261 S. W., 855.

With the above authorities as a guide to the construction of the clause of the Kentucky Constitution in controversy, to-wit: "or for the conduct of any business as a common carrier," let us examine it. The Circuit Court of Appeals would give to the word "any" the restricted and narrow meaning of "such" or "like." On the contrary, this word according to the general accepted definition by all lexicographers is that of "every" or "all." So with this usual and ordinary meaning, the constitution would extend its prohibition to preferential or exclusive contracts not only regarding freight but to the "conduct of all (every) business as a common carrier."

This was the evident purpose of the framers of the Constitution to prevent any preferential or exclusive contracts by common carriers which from their public nature and service, and powers granted and exercised, would thereby create monopolies, and unjust discrimination and throttle competition.

So, if the contract in controversy is made in the conduct of any common carrier business, be it freight or passenger, it falls within the prohibition of the Constitutional provision.

Now, to best determine this is to examine the contract itself and especially paragraph 5 thereof heretofore quoted on page 27 of brief.

This Court will note that not only is the exclusive privilege to solicit the handling and hauling of the railroad's passengers and baggage given in the station and on the platform and premises, but likewise on the trains themselves of the railroad.

And further under paragraph 7 of the contract (Transcript, page 15):

> "That the railroad company shall issue baggage checks in such quantities as may be required by the transfer company and hereby empowers said transfer company to attach checks to baggage at whatever point, or location it may be delivered to the transfer company for delivery to the depot of the railroad company."

This gives the favored taxi company the exclusive right to check baggage at any point in the city of Bowling Green or elsewhere that the taxi company operates.

We quote these provisions to show that it is "carrier service" that is affected and necessarily embraced in this contract, and must be included in the contemplation of the constitutional provisions.

It cannot reasonably be argued that the railroad could make any kind of preferential contract regarding passenger service, but was prohibited from like contracts regarding freight. And if this prohibition applies to passenger service at all, it certainly embraces this character of contract which extends to passengers, prospective, in transit, and on arrival at destination.

The Kentucky case of *Browning* v. *L. & N. R. R. Co.*, 281 S. W., 490, cited in the opinion of the United States Circuit Court of Appeals did not involve either of the constitutional provisions in controversy, nor even the statutory provisions cited by the Court. This was a case where a person sought to compel the railroad to permit him to erect a coal shute on its right-of-way for purely private purposes. This the court refused to do, holding that this matter did not affect the railroad company's passengers, freight or servants, holding as in a previous decision that the public was not affected in any way and could not be.

In the instant case the public is materially affected as it is compelled to walk some 150 feet from the railroad station to get a competitive taxi, or to submit to the charges of the Yellow Taxi Company, which are in certain particulars for similar service greatly in excess of one of its competitors.

Nor does the references by the compiler of the Kentucky Statutes, or his annotations militate

against our position. It seems that this identical and precise question as affecting passengers has never been before the Kentucky Court of Appeals, but certainly by analogy both of reason and constitutional intention, this section would prohibit preferential contracts affecting passengers as fully as preferential contracts covering live stock as held in the Stockyards case (133 Ky., 148).

The last clause in the Section of the Kentucky Constitution under consideration would be mere surplusage and a meaningless repetition if it be confined to freight business only. The words "receipt, transfer, delivery, transportation, handling, care or custody of any freight," as used in the Section certainly covers every possible and conceivable contract regarding freight, and to interpret the last clause "or for the conduct of any business as a common carrier," as applying only to freight would add nothing to the preceding part.

It is presumed that every clause in a constitutional provision is significant, enacted for a purpose and carrying a potent meaning.

The transportation and delivery of freight is but a part of the carrier business of a railroad. The carriage of passengers and baggage is equally carrier service. Is it then reasonable to conclude that a constitutional inhibition against preferential and exclusive contracts should be narrowed and limited to freight alone, when it expressly inhibits freight contracts and adds "or (contracts) for the *conduct of any business as a common carrier*"?

Baggage is a species of freight, yet under the learned Appellate Court's interpretation the preferential contract herein giving the respondent the exclusive right to receive and haul baggage as well as passengers is permissible and not within the constitutional inhibition.

We respectfully submit that this construction appears both illogical and unjust to the public sought to be protected thereby.

And if we have recourse to the debates on these sections of the Constitution, and the report of the Convention Committee on Railroads and Commerce, it can be seen that the convention was against a discrimination whether in freight or passenger service, and against a railroad granting exclusive and preferential contracts as common carrier of whatever character, be they freight or passenger.

As said by one of the members in debating these various provisions applicable to railroads.

> "They are public corporations, created to subserve the public interests, and the moment you subserve one individual at the expense of the public, you have violated the fundamental principle on which common carriers are created. A common carrier must treat everybody alike. That is all we ask."
>
> Debates, Constitutional Convention (Ky.), 1890, 4 Vol., pages 5132-5162.

We respectfully submit that in the light of the intent of this Section, the debates thereon, the evil to be prohibited, the rule of construction to give effect to every part and avoid surplusage and repetition, and especially in the light of the express language itself this Section 214 was intended to and did cover the contract in controversy.

The first case of *McConnell* v. *Pedigo & Hays*, involving these contracts, was decided, as we have heretofore stated, prior to the adoption of the present Constitution of Kentucky, nor was the issue of unconstitutionality raised in the subsequent similar cases as the reports show.

Had it been, there can be no doubt the Kentucky Court of Appeals would have applied this Constitutional barrier as readily as it did the barrier of public policy of the State, and as it applied Sec. 214 to a similar preferential contract for delivery of live stock in the Stockyards case (*supra*).

If this constitutional provision applies to contracts affecting passengers or applies to any business of a common carrier other than freight, it stands as a prohibition and barrier to the contract under consideration.

V. Extending Injunction to Curd Street Was Error

There is apparent confusion in the opinion of the Circuit Court of Appeals with reference to the Curd Street issue in this case. It is not a question of in-

terference by petitioner with respondent in the use of this street in its ingress or egress from the railroad station, but it is the absolute setting apart for the exclusive use of respondent a part of this public street, and prohibiting petitioner from using it in any way. This is petitioner's ground of complaint.

In order that this Court may fully understand the facts and thereby avoid the lower court's confusion, we will briefly review the facts upon which this issue is based.

Curd Street is a public street of the City of Bowling Green and has been for thirty years or more. It runs from Kentucky Street in a westwardly direction across the tracks and right-of-way of the railroad through what is known as the Ragland Addition to Bowling Green. This street adjoins on the south the recently acquired property of the railroad upon which the new passenger station at Bowling Green is built.

For the railroad's convenience and to avoid such regulation and stopping of trains as the open street would necessitate, the City of Bowling Green by ordinance closed that portion of Curd Street which crossed the tracks and right-of-way of the railroad, but the street in all other respects and up to the railroad's right-of-way is still a public street of the city.

No deed or grant of this street contiguous to the right-of-way on either side of same was made by the city to the railroad, nor does the railroad assert or show any ownership or exclusive right to this street.

There is a part of Curd Street between Burnum's alley, so-called, and the right-of-way of the railroad a space south of the railroad property, about fifty feet in depth and the width of the street, which is about thirty feet. This space the railroad, as we insist, without legal right or authority from the city has given to the respondent Taxicab Company as an exclusive parking space, prohibiting the petitioner from parking its cars therein or using it in any way.

This is the parking space referred to in paragraph 6 of the contract (R., 10). It is to this unwarranted appropriation of this public street and property by the railroad and its exclusive grant to respondent for parking purposes to petitioner's exclusion, that exception was particularly taken and insisted on both in the District Court and upon appeal to the Circuit Court of Appeals.

That this is a flagrant invasion of petitioner's and the public's rights, we believe will be readily seen by inspecting the maps filed as exhibits herein.

This is especially injurious to petitioner, as it compels it to park its cars on the extreme south side of Curd Street east of Burnam Alley, some 50 to 75 feet further from the passenger station than would otherwise be required, and further places its taxicabs in such a position that passengers coming around the south end of the station pass this exclusive parking space occupied by respondent's cars before they can reach the cars of petitioner.

We do not believe that either the District Court or Circuit Court of Appeals were properly cognizant of the situation, or they would never have extended the injunction to exclude petitioner from a public street of the city.

It is not petitioner's duty to invoke the City to interfere and offer objection, as the opinion of the Circuit Court of Appeals would indicate, but rather it is the duty of respondent taxicab company to establish a legal right to this exclusive use, when the facts and presumptions are to the contrary. This was never done or attempted, and the injunction is clearly erroneous in this particular and not sustained either in law or fact by the Donovan case cited in the opinion on this point.

VI. Conclusion

This case involves no Federal right. It is the request by a former Kentucky citizen, which has stepped across the border and incorporated in a neighboring state, made of the Federal Court of Kentucky to give it privileges, rights and advantages denied the citizens of the state where the court sits. It is a petition for judicial discrimination against the citizens of Kentucky in favor of an alien of the State. It is an attempt to create conflict and confusion in this state in matters herein involved, and to give respondent in Bowling Green exclusive advantages denied by the courts of Kentucky to citizens in Louis-

ville, Paducah and Glasgow where the same question arose.

To uphold this contract and permit the respondent Brown & Yellow Taxicab Company, to exercise privileges denied by the laws of the State of Kentucky, to your petitioner is in direct conflict with Section 202 of the Kentucky Constitution, which reads as follows:

> "Sec. 202. FOREIGN CORPORATIONS SUBJECT TO LAWS RELATING TO DOMESTIC CORPORATIONS. —No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this commonwealth."

The Kentucky Court of Appeals in construing the above quoted section of the Kentucky Constitution in the case of Castle's Admr. vs. Acrogen Coal Co., 145 Ky. 591, said on page 593:

> "And so, when a foreign corporation comes into this state, as did the Acrogen Coal Company, for the purpose of transacting business within this State, it subjects itself to *all* of the laws of this State applicable to domestic corporations. A foreign corporation is not entitled to enjoy in

this State any privileges or immunities that a domestic corporation can not enjoy. *What a domestic corporation can not do, a foreign corporation can not do.*"

(Italics are ours.)

Again the court of last resort in Kentucky construed Section 202 Kentucky Constitution in the case of Bowman vs. Breyfogle, 145 Ky. 443, and used almost the identical language quoted above from Acrogen Coal Company case.

Now it must be admitted by respondent that no Kentucky corporation could have entered into this contract in question with the Railroad Company. And under Section 202 of the Kentucky Constitution as construed in the Breyfogle and Acrogen Coal Company cases, no foreign corporation can be preferred over a Kentucky corporation and permitted to enter into a contract with the Railroad Company which the court of last resort in Kentucky has denied to the Kentucky corporations. This constitutional provision alone would prevent the contract in controversy being upheld and its enforcement permitted.

We believe that even if this case did not present precedents binding upon this Court, it would, as a matter of comity between courts, to avoid a chaotic condition in the law, and to prevent a palpable and unjust discrimination against Kentucky citizens, refuse to uphold and sanction the contract herein sued on.

We, therefore, respectfully ask that the petition for writ of certiorari be granted and the Circuit Court of Appeals' decision be reviewed and reversed.

Respectfully submitted,

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